
January 30, 2004

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
Office of the Secretary
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
Attention: Docket No. R-1167, R-1168, and R-1170
Regulation B (Equal Credit Opportunity), Regulation Z (Truth in Lending) and Regulation M (Consumer Leasing)

RE: Proposed Revisions to Consumer Disclosure Regulations- Comments of the American Financial Services Association

Dear Ladies and Gentlemen:

The American Financial Services Association ("AFSA") appreciates the opportunity to comment on the Proposed Rules issued by the Board of Governors of the Federal Reserve System with respect to the disclosure standards contained in three consumer protection regulations: Regulation Z, Regulation B, and Regulation M. AFSA represents nearly 400 financial services companies. Our diverse membership includes automotive finance companies, consumer finance companies, mortgage companies, commercial finance companies, credit card issuers and merchandise and department store retailers.

We appreciate the Federal Reserve Board's efforts to bring consistency to the legal standards that govern disclosure requirements. However, for the reasons discussed below, we believe that the current proposals to modify Regulations B, M, and Z will disrupt current practice and increase compliance costs without a corresponding benefit to consumers. Thus, we respectfully request that all of these proposals be withdrawn.

## OBSERVATIONS ON THE PROPOSALS

### Threat of Litigation

The threat of litigation based on "imprecise" explanations cannot be ignored. The proposed comment's guidelines (in subprovisions i. – vi.) for assessing whether disclosures are "readily understandable" will undoubtedly touch off a new wave of consumer class actions. These guidelines invite subjective assessments of consumers' comprehension of information disclosed, and the very impreciseness (e.g. "whenever possible") of the guidelines will fuel legal challenges. The guidelines will confuse more than they will clarify. Creditors will struggle with trying to fulfill all of the guidelines at

once, and will encounter the inherent tension between, e.g., shortness vs. imprecision, and concreteness vs. discouraged "legal" terminology. No matter how carefully a creditor balances these objectives, the proposal will ensure that challengers will always have some basis to assert that a chosen disclosure terminology fell short of some later proffered *other* "possible" alternative.

Increased verbiage, while seemingly discouraged by some of the guidelines, will result as creditors strive for precision and exclusion of "different interpretations." Documents will get longer and more difficult to understand -- and invoke a criticism already leveled at the privacy disclosures (under Regulation P) upon which the proposals are based. As courts have observed in assessing compliance with existing Regulation Z or Regulation M requirements, "too much information ('information overload') can be as bad as too little." Channell v. Citicorp, 89 F.3d 379, 382 (7th Cir. 1996), quoting Ford Motor Co. v. Milhollin, 444 U.S. 555, 568 (1980).

**Standardization Not Appropriate**

The first sentence of the Board's November 26, 2003 Press Release provides:

> The Federal Reserve Board on Wednesday published proposed rules to establish more uniform standards for providing disclosures under five consumer protection regulations.*** (emphasis added)

While generally speaking uniformity is desirable, in this case it is not. The statutes have different purposes and the notices and disclosures mandated by the statutes and regulations have different purposes within each regime.

For example, Truth in Lending provides information to allow a consumer to shop for credit. Equal Credit Opportunity prohibits discrimination in granting credit on several bases. The APR is a tool by which a consumer can shop. The ECOA notice informs debtors of the existence of the Act and gives them information on what to do if they think the Act has been violated. The same holds true throughout the five regulations and the multitude of notices and disclosures. Uniform, standard treatment is not called for. More flexibility, rather than "greater precision," better achieves the multiple purposes of the various notices and disclosures in the contexts of the five different statutes.

**Problems Using Regulation P as a Standard**

Regulation P is enforced by federal agencies with respect to the financial institutions under their respective jurisdictions. As such, unlike Regulations Z, B and M, there is no private right of action. As a result, interpretations of the Regulation P standard will be developed by each functional regulator with respect to the entities under its respective jurisdiction. Such interpretation is not true of Regulations B, Z and M. Interpretations of the proposals will occur only through years of costly and unproductive litigation that will likely never result in a coherent regulatory scheme.

**Official Staff Interpretation Fails to Provide a Safe Harbor**

The statutes provide that creditors acting in conformity with a staff interpretation (the Official Staff Commentary) have a safe harbor in any suit brought under the Act. The safe harbor is the purpose of this provision. The proposal fails to fulfill this statutory purpose.

"Whenever possible" may be intended to mean "whenever it works," but it does not mean that. It means whenever possible. When is it possible to use bullets? When is it possible to avoid "highly technical business language?" Similarly, "definite, concrete, everyday words" sets a standard no one could attain with confidence. Where would terms such as second mortgage, foreclosure, cure or computational method fall?

**Clear and Conspicuous is a Good Standard**

Conspicuous means easy to notice, obvious, attracting attention. This states the goal of the statutes very well. Given the myriad of forms and transactions under the five statutes covered by the proposals, flexibility is far preferable to the precision sought by these proposals.

**Other Federal Agencies Have Struggled with "Plain Language" Mandates.**

Other federal agencies (most notably, the SEC) have struggled to implement recent "plain language" mandates. The evidence regarding the effectiveness of these initiatives is mixed, and any such initiative consequently takes a significant amount of time. As a result, we think that any effort by the Board to revamp consumer lending disclosures would necessarily require more time and dialogue than this rulemaking process allows.

**Potential Conflict with Congress**

Congress is currently considering changes to the legal standard for consumer disclosures, changes which could conflict with the Board's proposal. A bankruptcy reform bill is pending on the floors of both the House and Senate this week that would alter several legal requirements regarding consumer disclosures. This bill contains several provisions that would require the Board to issue disclosure rules regarding minimum payments, introductory rates, late fees, and other topics. Efforts now to restructure disclosure rules could be rendered useless should Congress pass this legislation.

**Cost**

AFSA respectfully requests the opportunity to supplement our current comments with a future analysis of the comprehensive costs associated with the proposed regulations. In the meantime, we would like the Federal Reserve to consider that under its proposal, every form used under these statutes would have to be reviewed, many revised, new processing equipment might have to be purchased, no level of confidence in compliance could ever be achieved, and private civil actions for statutory damages would be

encouraged. Even without a submission of actual concrete cost estimates, the costs associated with this proposal are clearly too great to justify.

## OBSERVATIONS IN PRACTICE: An Analysis of Proposed Changes to Regulation Z

The macro-level concerns discussed above are individually depicted by the following analysis. For brevity, the discussion below focuses primarily on the specific changes proposed to Regulation Z, but our concerns apply equally to Regulations B and M.

The proposed regulations run counter to Congress' intent in 1980 to simplify Regulation Z requirements and reduce litigation over highly technical compliance violations. For example, the current proposals would effectively bring back type-size requirements such as those that were specifically eliminated from Regulation Z in 1980.[1] The Board carefully drafted current Comment 1 to Section 226.17(a)(1) to reduce "the number of technical disclosure burdens placed on creditors," and to reduce "costly and burdensome litigation over technical interpretations of the regulation."[2] The proposed changes would re-introduce such technical burdens and re-open the door to such costly and burdensome litigation.

The proposal makes no attempt to reconcile the new detailed "clear and conspicuous" guidance with the existing disclosure guidance and model forms found in Regulations B, M, and Z. Each of these regulations provides specific guidance and model forms for making the required disclosures that would not be amended by the current proposals. As the discussion below illustrates, it not clear how a creditor or lessor is supposed to reconcile the current guidance with the new proposals, nor is it clear to what extent the current model forms comply with the proposals. For example, Regulation Z Appendix H, Model Form H-1 has been the bedrock of creditor compliance with the segregated disclosure requirements of Truth-in-Lending for many years. The proposed regulation does not indicate whether this form been reviewed to determine if it satisfies the new requirements (e.g, highlight "key" terms, provide ample spacing, etc.).

### Avoiding Imprecise Explanations- Proposed Reg. Z Comment 2(a)(27)—1

The proposed comment states that disclosures should avoid "imprecise" explanations. However, this imprecise guidance will itself cause many creditors and lessors to add unnecessary details to avoid lawsuits alleging "imprecise" disclosures. Such details will lengthen documents and make them more difficult to understand. Note that many have criticized the length of the privacy disclosures made under Regulation P upon which the proposals are based.

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[1] Before 1980, Regulation Z required that all numerical amounts and percentages generally be printed in not less than 10 point type, 0.75 inch computer type, or elite size typewritten numerals.

[2] *See* 46 Fed. Reg. 20848 (April 7, 1981).

**Designed to Call Attention- Proposed Reg. Z Comment 2(a)(27)—2**

Proposed Reg. Z Comment 2(a)(27)—2(ii.)

The proposed comment states that "[d]isclosures printed in type sizes smaller than 12-point type do not automatically violate the standard." This comment strongly suggests that all type sizes below 12 points are suspect. This will force creditors and lessors to choose between litigation over type size or to adopt 12-point type for the disclosures.

The extensive nature of the Regulation Z and M disclosures make 12-point type unworkable. Take, for example, the extensive disclosure requirements under Regulation M for closed-end vehicle leases. Without considering whether the other requirements of the proposed clear and conspicuous guidance are met, the mere conversion of the disclosures required by Appendix A-2 into 12-point type using a standard typeface yields a disclosure that exceeds 10 inches in length and width.[3] When included in a typical lease agreement that otherwise uses 8-point type, this disclosure yields a document that is 11 inches wide and 25 inches long before the addition of any state-specific disclosure requirements. We understand that pre-printed forms longer than 26 inches cannot be produced by conventional means.[4] Given the extensive nature of some state disclosures, the de facto 12-point type requirement will compel many lessors to give the Regulation M disclosure in a separate document, despite the fact that consumers benefit from having all disclosures as part of the document that establishes terms and conditions for the transaction.

The proposed comment puts far too great an emphasis on the point-size of type as a means of ensuring that disclosures are clear and conspicuous. First, the point-size type requirements do not necessarily translate into comparable type sizes. Different fonts will appear larger or smaller even though they have the same type size expressed in "points." For example:

- Courier 12 versus Times New Roman 12: FF ff II ii

Second, typeface, letter spacing, and other formatting approaches can and are used to ensure the readability of smaller-type sizes. For these reasons, most states have, for many years, permitted credit and lease contracts to use 8-point type without question. This is true even of laws and regulations specifically requiring plain language documents.[5]

In summary, the suggestion in the proposed comment that type sizes smaller than 12-point are automatically suspect represents an expensive and radical departure from

[3] We would be happy to provide a sample of this disclosure but we were unable to obtain one in electronic form for submission with this comment.

[4] Multi-part forms greater than this length must be hand-collated, which is an expensive and time-consuming procedure.

[5] See Connecticut Consumer Contracts statute §42-152(c)(7); Texas Credit Commissioner Rule §1.306(d).

current practice that should not be undertaken without a demonstration of a compelling need.

Proposed Reg. Z Comment 2(a)(27)--2(iii) – Margins and Line Spacing

The proposed comment uses terms that are more susceptible to varying and subjective interpretations than to a common understanding -- "wide margins" and "ample line spacing." This exposes creditors to unnecessary litigation risk without providing a corresponding benefit to consumers.

Proposed Reg. Z Comment 2(a)(27)—2(iv) Guidance Regarding Key Words

The proposed comment introduces a new category of disclosure – "key words" -- that expands the hierarchy of clarity and conspicuousness by requiring different treatment than other required disclosures and other transaction information. The concept of "key words" seems to require that a disclosure, which as a whole must be clear and conspicuous, be presented in a way that makes portions of it, and only portions of it, even more clear and conspicuous, but not more conspicuous than "finance charge" or "annual percentage rate" to avoid conflict with existing 226.17(a)(ii).

The proposed comment also offers no guidance or standards for determining what a "key word" is either within a particular disclosure or within a group of disclosures. This places the creditor in an untenable position with respect to disclosures such as the disclosure that existing Section 226.18(k) requires. For example, which words are -- and are not -- key words in "If you pay off all your debt early, you will not have to pay a penalty"? In the instruction to refer to the contract document for certain other information that existing Section 226.18(p) requires, are any words key words when the disclosure appears next to the late payment, prepayment, and security interest disclosures? Adoption of the comment would cause creditors to consume unwarranted amounts of resources trying to divine the differences among levels in the hierarchy.

In addition, reasonable minds can differ about whether using "bold" or "italics" for text in the middle of a sentence is helpful or distracting.

Proposed Reg. Z Comment 2(a)(27)--2(v)

The proposed comment says that an example of a disclosure that is designed to call attention to the nature and significance of the information is a disclosure that uses "distinctive type size, style, and graphic devices, such as shading or sidebars" (emphasis added). Use of "and" in the quoted phrase suggests that the disclosure must have all three components, even though a disclosure can be clear and conspicuous when only one component is used.

**Proposed Reg. Z Comment 2(a)(27)--3 -- Other information**

The proposed comment suggests that even if a creditor uses all of the devices in Comment 2(a)(27)--2 to call attention to the disclosures, the disclosures still may not be

clear and conspicuous because the presence of other information “may be a factor” in determining whether the disclosures are clear and conspicuous.

Other information to which the comment refers includes contractual provisions, explanations of contract terms, state disclosures, and translations. It is a widespread industry practice to use the same document to disclose contractual provisions, explanations of contract terms, state disclosures, and translations. Those items are legitimate parts of a credit agreement and many people (both consumers and creditors alike) find it helpful for these items and the disclosures to be in the same document. The suggestion that their appearance with required disclosures "may" result in a violation, without offering additional guidance, introduces an unacceptable level of uncertainty and litigation risk and may result in discouraging this beneficial practice.

**Conflict between Proposed Reg. Z Comment 2(a)(27)—4 and existing Comments 24-1, 24(b)--1, and 24(c)(2)--3**

Existing Comment 24--1 makes advertising subject to the clear and conspicuous standard. Proposed Comment 2(a)(27)--4 would permit use of the term "APR" but only if a legend or description of it "is provided on the disclosure statement." The link between an advertisement and a disclosure statement is a non sequitur. Existing Comments 24(b)--1 and 24(c)(2)--3 allow advertisements to use "APR" without further explanation.

## Conclusion

**The Clock Isn’t Broken**

As discussed above, the Federal Board’s proposal will cause considerable disruption to current practices. The increased cost of compliance, additional staff time and a truly tenable threat of litigation would negate any justification for the drastic change in disclosures. And yet, there has been no showing that these changes are necessary or that the existing forms developed using the extensive guidance provided by the current regulation are in any way inadequate to accomplish the objectives of the disclosure requirements of Regulations B, Z, and M. Such a lack of justification suggests that perhaps the proposal is attempting to impose consistency for consistency’s sake. This is fraught with danger, specifically because the proposed uniformity does not take into account the substantial differences between the extent and the nature of the disclosures required by Regulations B, M, and Z and the more limited disclosures required under Regulation P. Thus, we respectfully request that the proposed changes be withdrawn.

We appreciate the opportunity to comment on the Proposed Rules. If you have any questions about this letter, please contact me at (202) 466-8606.

Sincerely,

Robert McKew
Senior Vice President and General Counsel
American Financial Services Association